



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

December 2, 1993

Honorable Leon F. Pesek, Jr.
Criminal District Attorney
Bowie County
P.O. Box 3030
Texarkana, Texas 75504

Letter Opinion No. 93-109

Re: Authority of a county to enforce an ordinance relating to landfills against a solid waste disposal facility exempt from state permitting under Health and Safety Code section 361.090 (RQ-535)

Dear Mr. Pesek:

We understand you to ask whether a county ordinance relating to landfills not "required to be permitted, licensed or regulated by . . . any . . . state regulatory agency" may be enforced against a company in "the process of constructing a non-hazardous solid waste disposal facility" in the county. The ordinance generally requires such "non-permitted" facilities to have a permit issued by the county pursuant to notice and hearing, regulates construction and operation of facilities, and provides for inspections and penalties. While we do not generally construe local ordinances in the opinion process and are unable to make findings of fact, it is our opinion, based on the information you present, that the county has no authority to enforce such ordinance against the company in question.

You say that the company "disposes" of "industrial solid waste" within the meaning of chapter 361, Health and Safety Code, the Solid Waste Disposal Act, which provides for state and local permitting and regulation of solid waste disposal. *See* Health & Safety Code §§ 361.003 (definitions), 361.017 (jurisdiction of Texas Natural Resource Conservation Commission over industrial solid waste), 361.061 (commission may require permits for solid waste facilities). You state further, however, that the company falls within the exemption from the state permitting requirement provided for in section 361.090 as follows, in pertinent part:

(a) The commission may not require a permit under this chapter for the collection, handling, storage, processing, and disposal of industrial solid waste that is disposed of within the boundaries of a tract of land that is:

(1) owned or otherwise effectively controlled by the owners or operators of the particular industrial plant,

manufacturing plant, mining operation, or agricultural operation from which the waste results or is produced; and

(2) located within 50 miles from the plant or operation that is the source of the industrial solid waste.

You also indicate that the company is not subject to a permit requirement from any other state agency and is thus within the purported ambit of the county ordinance at issue here, which, on its face, applies to "any landfill for which a permit is not required by . . . any . . . state regulatory agency."

You argue that, while chapter 361, as well as chapter 364 of the Health and Safety Code, the County Solid Waste Control Act, afford considerable authority to counties over solid waste facilities, the ordinance in question cannot be applied to the company you describe by virtue of section 361.152, which reads:

The powers specified by Sections 361.154-361.162 and Sections 364.011 and 364.012 (County Solid Waste Control Act) may not be exercised by a county with respect to the industrial solid waste disposal practices and areas to which section 361.090 applies.

Section 361.152 exempts section 361.090 facilities from the licensing and regulatory authority counties otherwise have with regard to specific facilities under chapter 361. Section 361.154 authorizes counties to issue licenses governing solid-waste facilities outside municipal boundaries and extra-territorial jurisdictions. Sections 361.155 through 361.160 provide for counties' notifying responsible state agencies of license applications, the separate licensing of separate facilities, license contents and fees, and their amendment, extension, renewal and revocation. Section 361.161 states that county licensed facilities need not have state permits. Section 361.162 allows counties to designate county territory suitable for such facilities. Section 361.152 also exempts section 361.090 facilities from the broad powers afforded counties under chapter 364, to wit the authority to regulate solid waste facilities by rule under section 364.011 and to prohibit such facilities under section 364.012.

Thus, the above-mentioned provisions cannot, pursuant to section 361.152, be applied to the company you describe. Nor do we find any other authority in state law for the county to enforce the ordinance provisions here against such a company. As counties only have such powers as are specifically granted by the laws and the constitution or as are necessarily implied thereby, we conclude, in light of the foregoing and based on the representations you have made, that the county has no authority to enforce the ordinance in question against the described company.

We do note finally, however, that although we do not believe the county may exercise authority against the company here under the ordinance you ask about, it may be able to accomplish some of the purposes which the ordinance was to have served under

authority of other state laws. For example, chapter 26, subchapter E of the Water Code authorizes local governments, including counties, to enter and inspect property in order to investigate "conditions relating to water quality," to make recommendations to the Natural Resource Conservation Commission, and to bring enforcement actions.

S U M M A R Y

Under the facts stated, a county has no authority to enforce a licensing and regulatory ordinance against a solid waste disposal facility exempt under Health and Safety Code section 361.090 from state permitting.

Yours very truly,

A handwritten signature in black ink, appearing to read 'William Walker', with a long horizontal flourish extending to the right.

William Walker
Assistant Attorney General
Opinion Committee